Fee Pd.
Inv. # 10862

STATE OF WISCONSIN

IN THE SUPREME COURT

Case No: 01-2789 and 02-2979

STATE OF WISCONSIN,

Plaintiff-Respondent-Respondent,

vs.

RALPH D. ARMSTRONG,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does the test for newly discovered evidence applied by the court of appeals in this case, which ignores the integrity of the original jury's deliberations and instead looks to a hypothetical jury, violate the Sixth Amendment of the United States Constitution or Article I, section 7 of the Wisconsin Constitution?

Trial Court & Court of Appeals Answer: The court did not discuss the jury-trial-guarantee implications of its decision.

II. Has Armstrong demonstrated that a new trial is mandated under the reasonable probability of a different outcome test when, as a result of new evidence, the court of appeals concedes that it is not possible to tell whether Armstrong is innocent or guilty?

Trial Court & Court of Appeals Answer: No.

III. What should be the standard and who should bear the burden of proof when postconviction testing proves that forensic evidence that the State presented to the jury was in fact false?

Trial Court & Court of Appeals Answer:

Armstrong argued below that the harmless error doctrine is most appropriate, because the State was the beneficiary of powerful but erroneous "scientific" evidence that tied him to the murder. The court of appeals was clearly troubled by this question of which test to use, but ultimately the court felt bound by its earlier decision in *State v. Avery*, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997):

> Which test we use is of potential significance. **This is an extremely close case. It is not possible to tell from this record whether Armstrong is innocent or guilty.** While we affirm the trial court's decision to use the newly discovered evidence test, **the use of a harmless-error test would probably result in our reversing the trial court's order.** . . . But the test for newly discovered evidence is the test the supreme court and this court continue to use. We are not free to develop a different test. *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

State v. Armstrong, No. 01-2789 & 02-2979, Ct. App. Slip. Op. May 27, 2004, ¶34(emphasis added); App. 115.

IV. Do the interests of justice warrant a discretionary reversal by this Court because the real controversy has not been fully tried?

Court of Appeals Answer: No.

STATEMENT OF CRITERIA JUSTIFYING REVIEW

This Court's review of the court of appeals' decision in this case is appropriate for the following reasons:

1. The case presents a real and significant question of federal and state constitutional law. Wis. Stat. (Rule) §809.62(1)(a). The legal analysis used by the court of appeals deprived Armstrong of his fundamental right to a jury determination of his guilt or innocence. It is undisputed that false biological evidence was presented to the jury in order to link Armstrong to the crime. That evidence has now been proven to be exculpatory, not inculpatory. While admitting that Armstrong's jury deliberated upon false evidence, the court nonetheless engaged in a constitutionally erroneous analysis by failing to consider whether this false evidence influenced the actual jury verdict. Instead, the court ruled that "the proper inquiry is whether a hypothetical, future jury at retrial would find Armstrong not guilty based on the totality of the evidence, including the new evidence obtained from advances in DNA testing." ¶37; App.116.

The court of appeals' approach is constitutionally impermissible because "the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action." *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993). Faced with undisputed evidence of actual error at trial, the court of appeals cannot simultaneously ignore the integrity of the original jury's

deliberations and play the role of fact-finder in a hypothetical retrial without offending the federal and state jury-trial guarantee. Had the court properly applied newly discovered evidence analysis, a new trial would be mandated because there is at least a reasonable probability of a different outcome.

2. This case demonstrates a need for the supreme court to consider establishing, implementing or changing standards of review when newly discovered scientific evidence conclusively demonstrates that a jury was previously presented with false conclusions about material trial evidence. Wis. Stat. (Rule) §809.62(1)(b). Review is also appropriate because a decision by this Court will help develop the law on postconviction review when a defendant presents DNA evidence that excludes him from evidence the state previously argued linked him to the crime, and which instead inculpates someone else in the crime. The court of appeals conceded that it is "anomalous that we use a more strict test where the State benefits from false factual conclusions than where the State benefits from an erroneous evidentiary ruling." ¶34, App. 115. Nevertheless, the court of appeals observed that "we are not free to develop a different test." *Id.* This Court, however, can and should develop a new doctrine to correct this unfair anomaly. Wis. Stat. (Rule) §809.62(1)(c))(1).

3. The court of appeals decision relies upon a legal standard and burden of proof applied in *State v. Avery*, 213 Wis. 2d at 234, which, ironically, led to Mr. Avery's continued wrongful incarceration for six additional years before he was finally exonerated by additional DNA testing. The passage of time and changing circumstances with innovations in scientific

technology, such as DNA, make the unfairly strict burden of proof in *Avery* ripe for re-examination by this Court. Wis. Stat. (Rule) §809.62(1)(e).

4. There are other "substantial and compelling reasons" for this Court to accept review, Wis. Stat. (Rule) §809.62(2)(c)), because the real controversy was not fully tried. The jury heard false biological evidence which linked Armstrong to the crime and was not given the opportunity to hear important new DNA evidence which suggests someone other than Armstrong murdered the victim. This Court should therefore grant Armstrong a new trial in the interest of justice, as it did in another DNA case, *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996).

STATEMENT OF THE CASE[1]

On June 24, 1980, the body of Charise Kamps was found in her apartment in Madison. She had been brutally sexually assaulted and murdered. Ralph Armstrong, an acquaintance of the victim, was charged with the crime and subsequently convicted following a jury trial.

The State's case against Armstrong was largely circumstantial, but critical corroboration of the State's theory came from eyewitness testimony and physical evidence allegedly linking Armstrong to the crime scene. The crucial eyewitness, Ricci Orebia, initially described the person leaving the scene of the crime as someone seven inches shorter than Armstrong, and

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[1]The lengthy procedural history of Armstrong's case is summarized in the court of appeals decision at ¶25-29, App. 110-112.

only identified the defendant after a controversial session of police-induced hypnosis. Orebia later recanted, under oath, his identification prior to trial, but then flipped again and identified Armstrong at the trial itself. (R. 167:236-255; R. 176; R. 177).[2]

The linchpin of the State's case to the jury was forensic evidence found at the murder scene. The jury was shown a photograph of the victim's blood-smeared body, over which the murderer draped a bloodied bathrobe belt. (R. 168:387; *See*, photo at App. 126)[3]. A crime lab technician testified to finding two head hairs on the bathrobe belt (R. 168:537), which had been "very carefully" removed from the victim's body.(R.168:387). A hair micro analyst testified that the hairs were "consistent with" and "similar to" reference samples from Armstrong. (R. 168:537, 539-541). During closing argument, the prosecutor picked up the victim's bloody robe belt, displayed it to the jury, and declared, "[t]wo of the defendant's hairs were on this robe" and that there was "no explanation" for those hairs being there "except that the defendant murdered Charise Kamps." (R. 171:20, 21). The State also introduced evidence that a semen stain found on a bathrobe recovered next to the victim's body (only the bathrobe belt was recovered on the body) came from a person with type A blood, the same blood type as the defendant's. (R. 168:543, 545).

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[2]Citations are to the record in the court of appeals.

[3]The photograph was later sent into the jury room during deliberations. This Court, on direct appeal, approved this use of the photo because it would "assist the jury in their assessment of the physical evidence connecting the defendant to the crime..." *State v. Armstrong*, 110 Wis. 2d 555, 579, 329 N.W.2d 386, 398 (1983). The bathrobe (with semen) and belt (with hairs) are both plainly visible in the horrific and disturbing photo.

The State argued that the semen evidence showed that Ralph Armstrong was the murderer. (R. 171:21-22).

At the close of his rebuttal argument, the prosecutor emphasized the hair and semen evidence to the jury, stating that:

> The physical evidence [of] Ralph Armstrong at the scene **ties him irrevocably** to the murder of Charise Kamps.

Id., at 131 (emphasis added).

Long after Armstrong's conviction, the science of DNA testing developed. This breakthrough technology finally made it possible to test the prosecutor's claim that the physical evidence irrevocably tied Armstrong to the crime scene. Initially, Armstrong arranged for Dr. Edward Blake to perform DNA tests on the semen stain from the victim's bathrobe. These tests conclusively proved that the semen could not possibly have come from Ralph Armstrong. (R. 114; *see also*, R.155, Exhibit 1, p. 12). Subsequently, Armstrong arranged for the two critical head hairs from the bloodied bathrobe belt to be subjected to mitochondrial DNA tests. Once again, DNA tests flatly contradicted the State's argument to the jury at trial when they conclusively proved that the two hairs could NOT have come from Armstrong. (R.155; App.152).

The mitochondrial tests also show that neither the victim nor her boyfriend were the source of the head hairs. However, the tests do show that both hairs came from the same unknown person. (R. 155, Exhibit 1; App. 152).

Armed with these new findings, Armstrong filed a motion in Dane County Circuit Court, Judge Fiedler presiding, seeking a new trial. (R. 155, Exhibit 1). Armstrong argued that all of these findings prove that the biological evidence that the State used at trial to link him to the murder was false and that, moreover, the new evidence is actual affirmative proof of innocence. The trial court denied the motion (R. 174; R. 156), as well as a motion to reconsider.(R. 180-183). Appeals of the denials of both motions were consolidated.

The court of appeals, in a decision dated May 27, 2004, affirmed the trial court (App. 101-22). The court acknowledged that "this is an extremely close case. It is not possible to tell from this record whether Armstrong is innocent or guilty." ¶34, App. 115. The court further stated that if it was to use a harmless error test it would probably reverse the trial court. However, the court believed it was bound by prior case law which employs the test for newly discovered evidence developed for cases where a defendant offers new evidence not previously presented to the jury. The court agreed that:

> The distinction Armstrong makes between newly discovered evidence not presented to the jury and evidence later shown to be false is a rational distinction. Additional evidence is conceptually different from evidence from which the State argued false conclusions. But this distinction has not been recognized and we cannot escape the undisputed fact that Armstrong's DNA evidence is newly discovered. It may be anomalous that we use a more strict test where the State benefits from false factual conclusions than where the State benefits from an erroneous evidentiary ruling. But the test for newly discovered evidence is the test

> the supreme court and this court continue to use. We are not free to develop a different test. *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

¶34, App. 115. The court therefore held that the trial court applied the correct legal standard. The court of appeals further held that despite Armstrong's DNA exclusions he did not clearly and convincingly demonstrate a reasonable probability that the outcome would be different on retrial. ¶44, App. 119. The court also declined to reverse in the interest of justice. ¶45-50, App. 119-22. This petition follows.

ARGUMENT

I. The court of appeals improperly applied the "reasonable probability of a different outcome" test to newly discovered evidence, which proved that Armstrong's trial was tainted by the admission of false biological evidence and the omission of important, truthful evidence pointing towards another suspect.

A. The court of appeals' use of a "hypothetical retrial" analysis violates the Sixth Amendment of the United States Constitution and Article I, section 7 of the Wisconsin Constitution because it fails to use the full record of the original trial to measure the impact of the new evidence of

innocence on the original jury.

The right to a trial by jury in serious criminal cases is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). This right includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana*, 508 U.S. at 277 (citing *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)). Wisconsin's state constitutional right to a jury trial is even more protective than the federal right. *State v. Hansford*, 219 Wis.2d 226, 242-43, 580 N.W.2d 171, 178 (1998).

When he was tried in 1981, the jury heard powerful testimony linking Armstrong to semen and hair found at the crime scene. DNA testing has now conclusively demonstrated that this testimony was false. Armstrong argues that this material and false evidence improperly influenced the original jury's deliberations to such an extent that a new jury is needed to determine guilt or innocence. The court of appeals, however, ruled that "[o]ur job is not to determine how, if it all, the false evidence influenced the jury at the first trial." ¶37, App. 116. Rather, the court maintained, "the proper inquiry is whether a hypothetical, future jury at retrial would find Armstrong not guilty based on the totality of the evidence, including the new evidence obtained from advances in DNA testing." *Id.* (citing *State v. Boyce*, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977)).[4] This

[4]The court of appeals citation to *Boyce* as authority for this point is puzzling. The *Boyce* court never referred to a "hypothetical, future jury at retrial." In point of fact, when discussing whether

approach nullifies any role for an actual jury in finding guilt – the integrity of the actual jury's deliberations is ignored, and a purely hypothetical jury reaches the second (presumably untainted) guilty verdict.

This Court has already emphasized the impact of false evidence upon real juries in the newly-discovered evidence context. In *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996), this Court held that a new trial was in order when new DNA evidence excluded the defendant as the source of hair that had been used as affirmative proof of his guilt at trial. Although the new trial was granted "in the interest of justice," the reasoning hinged on the fact that Hicks' original jury never heard critical DNA evidence that showed some of the State's "proof" of guilt to be false. 202 Wis.2d at 158-59, 549 N.W.2d at 439. The Court repeatedly filtered its analysis by reference to the jury's deliberations and the impact of false hair evidence upon the jury.[5] The Court concluded with a powerful affirmation of the integral role of juries in our system of justice:

> In cases such as this, we must depend upon the jury to deliver justice. To maintain the integrity of our system of criminal justice, the jury must be

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it was "probable that a different result would be reached on a new trial," the *Boyce* court clearly deferred to the trial judge's judgment about the effect certain testimony had on the original jury. 75 Wis.2d at 461, 249 N.W.2d at 762 ("The trial judge had the opportunity to view all the witnesses and the probable effect they had on the jury.").

[5]*See, e.g., id.* at 158-59 ("We cannot say with any degree of certainty that the hair evidence used by the State during trial played little or no part on the jury's verdict."). *See also* id. at 163, 164, 171.

> afforded the opportunity to hear and evaluate such critical, relevant, and material evidence, or at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent with the facts. Only then can we say with confidence that justice has prevailed.

Id. at 171-72 (citing *Garcia v. State*, 73 Wis.2d 651, 655, 245 N.W.2d 654 (1976)).

In Armstrong's case, the court of appeals has implemented the newly-discovered evidence test in such a way that extinguishes the role of a real jury in delivering justice. Armstrong's jury was not only denied the opportunity to hear and evaluate exculpatory DNA evidence, it was also presented with evidence on a critical issue later determined to be false. Rather than confront this injustice, the court of appeals announced that it would ignore the original jury, and instead conduct a purely hypothetical retrial. This approach violates Armstrong's fundamental right to a determination of guilt or innocence *by a jury of his peers.*

It is not relevant to the jury-trial issue that the trial court's evidentiary rulings were not erroneous at the time they were made, as the court of appeals believed. ¶34, App. 115. The problem is that the new evidence renders the jury's deliberations suspect. *See Hicks*, 202 Wis. 2d at 164 (jury did not hear key DNA evidence "not because of an erroneous ruling, but because the testimony did not yet exist."). In other words, the DNA test results are merely new evidence of a fundamental error at trial of constitutional dimensions. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694 (1984) (finding constitutional error when "[t]he result of the proceeding can be rendered

unreliable, and hence the proceeding itself unfair."). When constitutional error has potentially affected a jury's verdict, "[t]he inquiry... is not whether, in a trial without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. at 279.

The constitutional infirmity of the court of appeals' approach is further underscored by the unfair advantages given to the State in its hypothetical retrial. First, the State did not carry the burden of proof beyond a reasonable doubt. Rather, Armstrong effectively needed to prove his innocence by clear and convincing evidence. Thus, even though the court of appeals confessed that "[i]t is not possible to tell from this record whether Armstrong is innocent or guilty," it nonetheless affirmed the imaginary jury's guilty verdict. Second, the State was permitted to maintain positions at the imaginary retrial that were inconsistent with positions it took at the real trial. The State whistled an entirely new tune to the hypothetical jury when it insisted that the hair and semen did not come from Ms. Kamps' attacker.

Neither the Sixth Amendment nor the Wisconsin Constitution allows a judge to uphold a jury verdict of guilt "beyond a reasonable doubt" by imagining a significantly different trial where the hypothetical jury assumes guilt absent "clear and convincing proof of innocence." "[T]o hypothesize a guilty verdict that was never in fact rendered– no matter how inescapable the findings to support that verdict might be– [] violate[s] the jury-trial guarantee." *Sullivan v. Louisiana*, 508 U.S. at 279-80 (citing cases). Because the court of appeals approach clearly violates the jury-trial

guarantee, this Court should grant Armstrong's petition for review.

B. The court of appeals conceded that it was "not possible to tell from this record whether Armstrong is innocent or guilty," thus a new trial is mandated under the "reasonable probability of a different outcome" standard.

The court of appeals held that the newly discovered evidence test controls this appeal, ¶34, App. 115, but then applied that test incorrectly. Under that test, Armstrong would have to prove, by clear and convincing evidence:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

¶32, App. 114, citing *Avery*, 213 Wis. 2d at 234. The State conceded the existence of the first four factors, but argued this new evidence did not demonstrate a reasonable probability of a different result on retrial. (R. 174:9-10). The court of appeals stated: "[i]f there is a reasonable probability that a jury would harbor a reasonable doubt as to guilt, it follows that there exists a reasonable probability of a different result." ¶36, App. 116.

The court of appeals' own internal logic indicated that Armstrong has met his burden under *Avery*. The court admitted that "[i]t is not possible to tell from this record whether Armstrong is innocent or guilty." ¶34, App. 115. Not being able to tell whether a person is innocent or guilty is the very definition of reasonable doubt as to guilt. Since the record before the court was not significantly different from that before the jury[6], it follows that a jury would come to the same conclusion as the appellate court – and harbor a reasonable doubt as to guilt!

Putting aside the inscrutable logic of the court of appeals, it is apparent that Armstrong meets the *Avery* test. With the physical evidence from trial discredited, the court relied instead on circumstantial evidence and eyewitness testimony to support its conclusion that the probable result on retrial would not be different. The court found several pieces of evidence to be incriminating to Armstrong:

> Orebia identified him in a line-up procedure and described his vehicle in detail without any apparent motive to fabricate these identifications. Kamps' apartment showed no sign of forcible entry, suggesting she voluntarily let her killer inside; Armstrong and Kamps were friends. Armstrong deposited a large sum of cash in the bank the morning of the murder; a large sum of cash was missing from Kamps' apartment.

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[6]The court of appeals had available for review the entire trial record, including all transcripts of testimony and exhibits presented to the jury. *See*, Index of Record, #01-2789, prepared by the Dane County Clerk of Circuit Court and filed on December 6, 2001.

¶38, App. 116-17. The court also stated that Armstrong's whereabouts on the evening of the murder was "open to rebuttal." ¶39. App. 117. With only these few remaining shreds to hold the State's case together, it is no wonder the court conceded "this is an extremely close case." ¶34, App. 115.

Testimony of Orebia

Besides the physical evidence, the most important evidence used to convict Armstrong was the testimony of Ricci Orebia. However, Orebia's credibility and reliability as a witness for the State has always been highly suspect. No matter which of Orebia's many sworn stories, recantations, and recantations of previous recantations one prefers, he was clearly an admitted perjurer.[7]

Orebia time and again contradicted himself on the witness stand. Prior to hypnosis, Orebia's description of the person he observed could not have been Armstrong. Orebia initially described the person as about five feet, five inches tall -- fully seven inches shorter than Armstrong. (R. 169: 777). The hypnosis session contained obviously leading questions designed to increase Orebia's estimate of the suspect's height. Indeed, even the trial judge and the Supreme Court recognized that the hypnotist made "unnecessary suggestions with regard to the suspect's height . . . which might have been incorporated into Orebia's memory." *State v. Armstrong*, 110 Wis. 2d at 564, 574-75. Those courts ultimately dismissed such suggestions

[7] Orebia admitted no less than seven different times in his trial testimony that he had lied under oath. (R. 167:237-43, 245-46, 250).

as not sufficient to warrant suppression of Orebia's testimony or the lineup identification, but they nevertheless reveal the dubiousness of Orebia's testimony.

Orebia's identification of Armstrong is made further suspect by the fact that he viewed a photograph of Armstrong during the hypnosis session. (R.176:12-13). Detective Lombardo admitted that he had an 8x10 photo of Armstrong with him during the hypnosis session, and that both he and the hypnotist left Orebia alone in the room for awhile. (R. 161: 12-13, 15, 17)[8]. Whether intentionally or inadvertently, if Orebia was permitted to see a photo of Armstrong during hypnosis, this would have improperly influenced his later identification of Armstrong.

The State has repeatedly offered the testimony of Laura Chaffee, the neighbor who lived below the victim's apartment as untainted corroboration of Orebia's identification. The State argued that Chaffee heard music emanating from the victim's apartment on the night of the murder and that, following a police "re-creation,"[9] Chaffee claimed that the music "sounded like" Grand Funk Railroad, a popular band that

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[8]Detective Lombardo knew that Armstrong was the State's leading suspect and attended the hypnosis session, and interjected his own questions and comments to Orebia. (R. 169:664, 767-68, 771-73, 791). After the hypnosis session with Lombardo, Orebia changed his description to more closely match Armstrong.

[9]Unknown to the court and jury was the fact that the police altered the crime scene by greatly amplifying the bass controls in order to obtain even a tentative identification of the music by Chaffee. (R. 182: 5-6; App. 187-88).

Armstrong liked. (R.174: 105). However, new evidence, unbeknownst to the original trial court and jury, revealed that Chaffee, like Orebia, was subjected to hypnosis by the police! (R. 182: 3; App. 185). It was only after hypnosis that the police played the album for Chaffee, resulting in her statement that it sounded similar to the music she had heard.(R.167: 94; R.182: 6; App. 188).[10] Given these revelations, Chaffee's testimony is rendered suspect, and does not bolster Orebia's own testimony. Flimsy testimony of one witness should not be bolstered by the manipulated testimony of another.

More importantly, now that the key physical evidence corroborating Orebia's testimony has been shown to be false, his testimony can be fully seen for what it always was - the unreliable, inconsistent, hypnotically induced, ruminations of a known and admitted perjurer. Absent the apparent corroboration of biological evidence, Orebia's testimony would have been hard for any jury to swallow. However, scientific evidence tying Armstrong to hairs found on a belt on top of the victim's nude and bloody body appeared to corroborate the flimsy identification. This incredibly damning evidence lead the jury to forgive flaws and inconsistencies that it ordinarily would not have forgiven. Removing the "scientific corroboration" tears

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[10]The procedure required by the Wisconsin Supreme Court for the use of a witness who has been hypnotized (established in the direct appeal of this case, *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983)), was not followed for the hypnosis session with Chaffee. As the proponent of her testimony, the State had an obligation to let the court know Chaffee had been subjected to police induced hypnosis. But the prosecution never told the trial or appellate courts that Chaffee had undergone hypnosis.

the foundation out from under Orebia's testimony. If presented with DNA evidence, there is a reasonable probability that a new jury would reject Orebia's testimony.

Other Circumstantial Evidence

Armstrong presented reasonable explanations for the money he deposited, ¶28, App. 111-12, and the court of appeals' observation that there were no signs of forced entry proves little. That Armstrong was one of Kamps' friends does not make him her killer. Indeed, according to the prosecution at trial, Kamps' real killer left two of his head hairs on the bathrobe belt.

This fact demonstrates that the court of appeals concern about Armstrong's explanation of his whereabouts between 9:00 and 10:00 p.m. on the evening before the murder is misplaced. The critical question is not, as the court of appeals suggests, "[w]hen did Armstrong go to Kamps' apartment on the evening of her murder?" ¶4, App. 102. Rather, the critical question for a jury is whether Armstrong was the killer who left the bloodied bathrobe belt draped over the victim's dead body. If, as the prosecution argued at trial, the killer left two of his hairs as his "calling card" on the belt, then the whole question of Armstrong's timeline is moot - because DNA proves the hairs did not come from him. In other words, it is irrelevant where and when Armstrong was on the evening of the murder since the physical evidence now points to another individual as the murderer. Wherever Armstrong may have been, he was not at Kamp's apartment at the moment she was brutally murdered and the perpetrator left the bathrobe belt on top of her.

Finally, as even the court of appeals admitted, key circumstantial evidence actually supported Armstrong's claim of innocence. For example, although the victim's body was covered in blood, police found no traces of blood in the bathroom, suggesting that the killer did not clean up before leaving. Despite the State's contention that Armstrong drove away from the crime scene, the crime lab found no traces of blood in Armstrong's car.[11]

In sum, the circumstantial evidence does not weigh heavily against Armstrong. It is critical to recall that all of this evidence – whether it is Ricci Orebia's hypnotically enhanced "on again, off again" identification or the alleged problems with Armstrong's alibi – was bolstered at trial by the physical evidence purportedly linking Armstrong to the crime scene. The court of appeals incorrectly analyzed the State's circumstantial case in a vacuum, as if the jury did not make inferences against Armstrong because of the seemingly objective semen and hair evidence. However, this is not how juries work, and now that DNA testing has disproved the critical semen and hair evidence, the State's entire circumstantial case falls apart.

On the other hand, the new scientific evidence is highly probative of actual innocence. The two head

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[11]While a crime analyst did get positive reactions on hemosticks for the possible presence of trace amounts of blood on Armstrong's finger and toenails, postconviction tests by Dr. Blake revealed no human blood present on either the swabs or microscopic slides prepared by the analyst. The State argued below that the analyst had "used up" the material on the swabs in her test, but could not explain the absence of any blood whatsoever on the slides prepared by the analyst. *See* ¶23, 27, App. 110-11; R. 155: Exhibit 5, p. 13 & attachments, Fig. 29, 30, 31, 32.

hairs found on the bloodied bathrobe were likely left by the actual murderer. With an alternate suspect out there, and without a credible case against Armstrong, it is clear that there is a reasonable probability of a different result on retrial.

II. This Court should fashion a new rule to govern newly discovered evidence cases where "new evidence" demonstrates that the State benefitted by false conclusions at trial.

Since the DNA testing at issue in this case occurred after the trial, the parties and the courts have all characterized the revelation that false evidence was used to convict Armstrong at trial as "newly discovered evidence." However, the court of appeals recognized "a rational distinction" between "newly discovered evidence not presented to the jury and evidence later shown to be false." ¶34, App. 115. Moreover, the court expressed its own reasonable doubt about Armstrong's guilt and admitted that under a different test, it would likely "revers[e] the trial court's order." *Id.* In the end, the court of appeals reluctantly affirmed the use of this "anomalous" and "strict" test and justified its own failure to abide by logic and fairness by stating, "[w]e are not free to develop a different test." *Id.* (citation omitted). This is a clear invitation to the Supreme Court to announce a new rule, and Armstrong urges this Court to accept the invitation.

Before this case, the last time the court of appeals seriously mooted the "reasonable probability of a different outcome" prong and the appropriate burden of proof was in *State v. Avery*. The court of appeals relied heavily on *Avery* in this case. Although the

inappropriateness and grim irony of clinging to the test from *Avery* in this situation is readily apparent[12], it is important to note that the "newly discovered evidence" in this case is distinguishable from *Avery*. In that case, the new evidence came in the form of a DNA test that implicated another individual as the source of fingernail scrapings found under the rape victim's nails. *Avery,* 213 Wis. 2d at 232. At Avery's trial, the prosecutor did not argue that biological material under the victim's nails belonged to Avery. Thus, the evidence offered by the defendant simply hadn't been discussed at the original trial. This is classic "additional evidence," which does not inherently cast doubt on the jury's deliberations. In such a case, it may be reasonable that the defense shoulder the burden to show that the new evidence would be reasonably likely to result in a different outcome at retrial.

However, as the court of appeals recognized, the DNA evidence in Armstrong's case does more than add evidence to the record. It reveals that the State presented patently false and misleading evidence against Armstrong at his trial. "[E]vidence from which the State argued false conclusions" is conceptually

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[12]History has revealed that *Avery* allowed an enormous miscarriage of justice to continue. Additional DNA tests eventually conclusively linked another man (who was actually a suspect at the time of the investigation) to the crime for which Avery was convicted. (Milwaukee Journal Sentinel, Sept. 12, 2003). Steven Avery served more than 17 years in prison for a crime he did not commit, and he spent six of those years in prison after the court of appeals denied him a new trial. While Avery is now finally free, the court of appeals is still applying an unfairly difficult test from that case on other potentially innocent defendants, like Armstrong, who present postconviction DNA evidence which excludes them from physical evidence of the crime.

different from "additional evidence." ¶34, App. 115. Indeed, the situation presented in this case does not appear to have been squarely addressed in any Wisconsin case involving a motion for a new trial based on newly discovered evidence. A different test more precisely tailored for this situation is sorely needed.

In considering whether a different test should apply, the threshold question should not be whether the trial court's evidentiary rulings were erroneous at the time they were made, but, rather, whether there is any dispute *now* that truly erroneous evidence was actually admitted. In other words, the reviewing court should first consider whether new evidence merely creates doubt about evidence introduced at trial, or whether the new evidence conclusively establishes that the admitted evidence was erroneous. The most common newly-discovered evidence situations, such as witness recantations, would rarely pass this threshold test since recantation usually begs the question as to which witness statement is to be believed.

However, in this case, there is no dispute that the admitted hair and semen evidence was material and erroneous. This is because DNA is uniquely reliable and objective forensic technology, and testing has demonstrated to a moral certainty that the hair and semen linked to Armstrong at trial did not belong to him. Since it is undisputed that the trial evidence was false, fairness, logic, and the constitution require that the test for a new trial in this situation consider the integrity of the original jury's deliberations, including the presentation of evidence that was made to the actual jury. Similarly, since it was the State that benefitted from the original error at trial, it should be the State's burden to prove that the integrity of the

original jury's deliberations was not undermined by the introduction of false evidence.

The obvious analogy to this proposed test is the harmless error situation; i.e., once it is established that material evidence has been erroneously admitted, the error is reversible unless the *state* is able to prove that there is no possibility that the tainted evidence contributed to the conviction. *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985). In the harmless error context, in fact, the State must prove the absence of prejudice beyond a reasonable doubt. *State v. Poh*, 116 Wis. 2d 510, 529, 343 N.W.2d 108, 118 (1984)[13]. Thus, the State in this case should bear the burden of proving that the false and misleading evidence it presented as scientifically reliable at trial did *not* affect the outcome.

As the court of appeals effectively conceded, the State would not prevail under such a test. ¶34, App. 115. During his closing argument, the prosecutor argued that "physical evidence... demonstrate[d] conclusively that Ralph Armstrong [was] the person who murdered Charise Kamps." (R. 171:9). Now DNA evidence shows that Armstrong was not the source of the semen stain, and that a third person (other than the victim's boyfriend) deposited hairs in the most incriminating location possible – the belt of the victim's bathrobe, which was found bloodstained over the victim's dead body. Without physical evidence, the case

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[13]Other analogies suggest a similar test, while preserving "reasonable probability of a different outcome" language. For example, in the withholding of exculpatory evidence context,"[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion); *see id.* at 685 (White, J., concurring).

against Armstrong was weak, based on circumstantial evidence, hypnotically induced testimony and elaborate efforts to raise questions about Armstrong's credibility. Where, as here, the verdict is already of questionable validity, additional evidence of relatively minor importance can be sufficient to create a reasonable doubt. *United States v. Agurs*, 427 U.S. 97, 113 (1976).

No matter how this Court chooses to address the critical issue of "false evidence" – by introducing a new test or changing the "reasonable probability test – Armstrong urges that the inquiry include recognition of the following elements: (1) whether constitutional error, in the form of demonstratively false "inculpatory" evidence, occurred at trial; and (2) whether the integrity of the original jury's deliberations was tainted by the false evidence.

III. This Court should grant review and order a new trial in the interest of justice because the real controversy in this case has not been fully tried.

In addition to the above grounds for a new trial, this Court has independent authority to reverse a judgment of conviction and remit a case for a new trial in the interest of justice. *Vollmer v. Luety*, 156 Wis. 2d 1, 456 N.W.2d 797 (1990). Under §751.06, the supreme court may grant a new trial in either of two instances: (1) whenever the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). When the real controversy has not been fully tried, the court is not required to find a substantial probability of a different result as a precondition to granting a new trial. *Wyss,* 124 Wis. 2d

at 735-36; *State v. Cuyler*, 110 Wis. 2d 133, 142-43, 327 N.W.2d 662 (1983). Rather, this Court may consider the totality of the circumstances and order a new trial to accomplish the ends of justice. *State v. Wyss*, 124 Wis. 2d at 735-36 (1985).

Wisconsin courts have found that the real controversy was not fully tried and ordered a new trial in two, distinct, factual situations: (1) cases where the jury had before it improper evidence which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried;[14] and (2) cases where the jury was not given the opportunity to hear important testimony that bore on an important issue of the case.[15]

In *State v. Hicks*, 202 Wis. 2d at160, this Court granted a new trial for both of these reasons. At his trial, Hicks denied that he had raped the victim and presented a misidentification defense. The State offered expert testimony that hairs found at the crime scene were microscopically consistent with the defendant's hairs. After the jury found Hicks guilty, postconviction DNA testing revealed that at least one of the hairs attributed to him at trial could not have come from him. This Court held that because the jury did not have the opportunity to hear the DNA evidence that tended to exculpate, but did hear false testimony tending to

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[14]*See, e.g., State v. Penigar*, 139 Wis. 2d 569, 408 N.W.2d 28 (1987) (new trial granted because jury heard testimony from sexual assault victim regarding her sexual history that turned out to be false); *State v. Johnson*, 145 Wis. 2d 905 (1988).

[15]*See, e.g., Garcia v. State*, 73 Wis. 2d 651, 245 N.W.2d 654 (1976); *Logan v. State*, 43 Wis.2d 128, 168 N.W.2d 171 (1969)); *Cuyler*, 110 Wis. 2d 133.

inculpate, the defendant was entitled to a new trial because the real controversy had not been fully tried. 202 Wis.2d at 171-72.

The analogy to *Hicks* in this case is clear. Postconviction DNA testing has revealed that Armstrong's trial was tainted because of the admission of false hair-comparison evidence, and because the jury did not have the opportunity to consider the results of DNA testing which now links the biological material of an unknown individual to the victim's lifeless body. Just as in *Hicks*, the prosecution in Armstrong's case repeatedly used the biological evidence throughout the trial as affirmative proof of Armstrong's guilt. It was discussed in the opening statement, when the jury was told to "listen closely" to the micro analyst testimony. (R.166: 14-15). Testimony from the analyst consumed nearly 100 pages of transcript. In his closing statement, the prosecutor argued that biological evidence "conclusively" "ties" Ralph Armstrong "irrevocably to the murder of Charise Kamps." (R.171: 9, 131). To the jury, this biological evidence must have seemed overwhelming: semen and hair attributed to him was found inches from or on the victim's body. Against the weight of such evidence, Armstrong's defense must have seemed utterly unpersuasive. The false biological evidence that the State used to link Armstrong to the murder could only cloud *the* crucial issue in this case: the true identity of the murderer. Purely on this basis, Armstrong deserves a new trial in the interest of justice.

The court of appeals declined to reverse in the interest of justice by distinguishing *Hicks* from Armstrong's case. The only apparent basis for distinction is"[u]nlike Hicks, Armstrong admitted that he was in Kamps' apartment; he disputes only whether

he was there when the murder occurred." ¶49, App. 121. Yet in both cases the sole issue in dispute was the identity of the perpetrator. *Hicks*, 202 Wis 2d at 163. It matters not whether Armstrong was in the victim's apartment on a prior occasion, but rather whether he killed the victim and left a bloodied bathrobe belt on top of the victim's dead body. The presence of Armstrong's hairs on the bloodied belt was powerful evidence, which could not help but cloud the jury in its deliberations. DNA tests have now proved that the head hairs found on the bloodied bathrobe belt found draped across the victim's body did not originate from Armstrong, the victim or her boyfriend. And, importantly, the two unidentified head hairs came from the same person. Thus, the new testing biologically connects some as yet unknown individual to the belt - - *the only item that we know was clearly handled by the real perpetrator.*

Although the prosecution argued at trial that those hairs were connected to the actual perpetrator, on appeal the State has reversed course and claimed that "innocuous reasons explain why that physical evidence was present." ¶30. App. 112-13. Armstrong argued below that the State should be judicially estopped from arguing a position contrary to its position at trial. But the court of appeals concluded that "judicial estoppel does not lie because the facts are not the same in both cases: by Armstrong's own argument, newly discovered evidence would be presented at a second trial." ¶31, App.113. However, the court of appeals missed the point. The facts are really the same - that hair belonging to someone other than the victim was found on the bloodied bathrobe belt laying on top of her dead body. It is only the *conclusion* the State wishes to draw from those facts that has changed. It is fundamentally unfair for the State to change its whole theory about

such powerfully incriminating evidence without at the very least making them present that new theory to a new jury. *See, e.g., Commonwealth v. Reese*, 444 Pa. Super. 38, 46, 663 A.2d 206, 210 (Pa. Super. Ct. 1995) ("Because the jury did not hear evidence of other explanations for the deposit of this seminal fluid, it would have been improper for the PCRA court to have considered it when examining whether the DNA evidence was exculpatory.").

The State could legitimately argue that the hairs innocuously found their way onto the item left on the victim's body by the actual murderer – but only to a new jury. And at a new trial, Armstrong will have his constitutional right to confront and cross examine the crime scene detectives and analysts about the careful manner in which they handled the belt as they collected evidence. Only at a new trial will a jury of Armstrong's peers determine the merit of the State's new theory, which seeks to explain away all evidence which points to someone other than Ralph Armstrong as the killer. Due process and the Sixth Amendment demand no less.

Even if the doctrine of judicial estoppel does not bar the State's change of position about this crucial evidence, this Court should consider how it demonstrates that the real controversy has not been fully tried. The State simply should not be permitted to sell to the jury and courts the argument that Armstrong's conviction was supported by physical evidence linking him to the crime, then turn around now and say, in effect, "oops, we were wrong; the physical evidence really *excludes* him, but it doesn't matter because the hairs and semen weren't connected to the murder anyway." For the prosecution to invent a radically new theory of the crime after it has already

convicted Armstrong is, by definition, a concession that the prosecution's original theory was wrong and the original trial verdict was unreliable.

The false evidence that the jury heard and the critical, relevant, material evidence that the jury did not hear now expose that Armstrong's trial was not a minimally just or reliable adjudication of his guilt or innocence. As a result, neither Armstrong nor the factual evidence has ever been "fully tried." The only appropriate remedy is that his case be remitted for a new trial at which a jury can evaluate Armstrong's guilt or innocence in light of *all* of the relevant evidence and without the taint of dramatic evidence now known to be false. The integrity of the criminal justice system demands no less. This Court should accept review and reverse in the interest of justice.

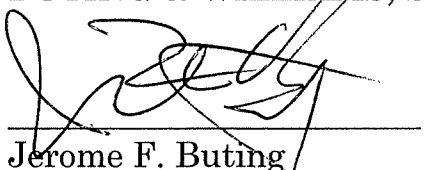
CONCLUSION

Based on the foregoing, Armstrong respectfully requests that this Court accept review of this "extremely close case," and order a new trial.

Ralph Armstrong has been imprisoned for 24 years for a crime he did not commit. The court of appeals has denied him a new trial by reference to a case that kept another man, Steven Avery, imprisoned for a crime he didn't commit. Fairness and the constitution demands that this injustice be rectified at long last.

Dated this 25th day of June, 2004.

Respectfully submitted,
BUTING & WILLIAMS, S.C.



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CERTIFICATION

I hereby certify that this Document conforms to the rules contained in Sec. 809.19(8)(b) and (c) as to form and certification. The length of this document is 7977 words.

Dated this 25th day of June, 2004.

Jerome F. Buting